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No. 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

HONORABLE WALTER J. LA BUY,
Petitioner,

vs.

HOWES LEATHER COMPANY, INC. and
MONTGOMERY WARD & CO., INC.,
Respondents.

HONORABLE WALTER J. LA BUY,
Petitioner,

vs.

HOWES LEATHER COMPANY, INC.,
Respondent.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

STATEMENT OF THE CASE.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents' "Statement of the Case" (Resp. Br. p. 2) does not contradict that of petitioner's. (Pet. Br. pp. 4-14.) The facts and circumstances impelling petitioner to order the references were carefully explained by petitioner to the parties prior to the entry of the orders of reference (R. 6), as is set forth in detail in petitioner's answers to the petitions for mandamus filed in the Court of Appeals

(R. 7-13; 215-18). These reasons were summarized in petitioner's opening brief (Br. pp. 10-13). Respondents in the Court of Appeals did not challenge by responsive pleading any of the allegations of petitioner's answers, and both the majority and dissenting judge of the court below gave full credence to the reasons impelling petitioner to order the references. The issues framed by the pleadings are not, therefore, confined to the formal recitation contained in the referral orders (R. 4, 213-214). Rather, these orders are to be legally measured against the standards contained in Rule 53 (b) of the Federal Rules on the basis of all of the circumstances occasioning the two orders of reference.

ARGUMENT.

I.

The Court of Appeals erred in Ordering the Writs of Mandamus to Issue.

Rule 53 (b) of the Federal Rules vests the trial court with discretionary authority to order a reference in non-jury actions upon a showing that "some exceptional condition requires it". It is conceded that petitioner had jurisdiction and authority over the parties and the subject matter of the cases referred, and it is further conceded that he had, under Rule 53 (b), the power to act. This Court is therefore met at the threshhold of its inquiry with whether the Court of Appeals had authority, under the "All Writs Act" (28 U.S.C. 1651 (a)) in the light of these conceded facts, to issue the writs of mandamus here challenged. For the reasons stated in petitioner's opening brief (Br. pp. 29-37), petitioner contends that the Court of Appeals erred in ordering the writs of mandamus to issue, whether viewed either as a lack of power because not "in aid" of their appellate jurisdiction, or merely as erroneous because writs of mandamus are not to be employed by Courts of Appeal to reverse discretionary and interlocutory orders of district courts.

1. Courts of Appeal, unlike this Court, possess only such powers as are conferred upon them by Congress. See *e.g.*, *Kline* v. *Burke Construction Co.*, 260 U.S. 226, 233-34 (1922). The "All Writs Act" confers upon the Courts of Appeal power to issue extraordinary writs, such as mandamus, only where such issuance is "in aid" of the court's jurisdiction. Since the orders of reference here

involved did not threaten the jurisdiction of the Court of Appeals, the court below lacked statutory power under the "All Writs Act" to issue the writs complained of. Respondents, however, seek to show that prior to the enactment in 1948 of 28 U.S.C. § 1651 (a), the Courts of Appeal possessed a general supervisory power under § 377 equivalent to that of the Supreme Court under § 342. (Resp. Br. p. 4). To support this contention, respondents rely on two sentences from *Ex Parte Peru*, 318 U.S. 578, 582 (1943) and *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 25 (1943). This Court in *Ex Parte Peru* held that a writ of mandamus could issue to a district judge despite the fact that the case was not directly appealable to the Supreme Court. This was followed in *Roche* where this Court stated that Courts of Appeal could issue writs of mandamus although no appeal had as yet been effected, but where the case was within the potential appellate jurisdiction of the Court of Appeals. This Court noted, however, that the issuance of a writ of mandamus in advance of appeal was for the *protection* of the appellate court's appellate jurisdiction, saying: "Otherwise the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the district court obstructing the appeal.". 319 U.S. 21, 25. As can be seen, the sentences quoted from these cases by respondents can hardly mean that Courts of Appeal possess a general supervisory power to issue writs of mandamus. Indeed, this Court has expressly interpreted § 377 as authorizing the issuance of extraordinary writs only where such writs are necessary to prevent the frustration of eventual appellate review. "*McClellan* v. *Carland*, 217 U. S. 268, 280, laid down the general rule applicable both to this court and to the circuit courts of appeals, that the power to issue the writ under R.S. § 716 (§ 377) is not limited to cases where its

issue is required in aid of a jurisdiction already obtained, but that 'where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below.'" *Ex Parte United States*, 287 U.S. 241, 246 (1932).

Respondents attempt to avoid the force of *In re Narragansett Pier Amusement Corp.*, 224 F. 2d 231 (CA 1, 1955), a case directly in point, by stating that the First Circuit "did not doubt its power to issue the writ, but merely held there were no 'exceptional circumstances' present . . .". (Resp. Br. p. 3). This statement is made in utter disregard of the decisions relied upon in the *Narragansett* case. 224 F. 2d 231, 232 (1st Cir. 1955). These decisions clearly show that the First Circuit will issue mandamus only where the action of lower court tends to impede or frustrate the Court's eventual jurisdiction. Indeed, when read in context, the holding of the *Narragansett* case is unmistakably clear.

McCullough v. *Cosgrave*, 309 U.S. 634 (1940) also offers no support to respondents. That case in no way involved any issue of the power of Courts of Appeal to entertain and issue writs of mandamus, and was decided prior to the 1948 revision of the Judicial Code at a time when this Court's power to issue mandamus was much broader than that specifically granted to the Courts of Appeal.[1] Furthermore, the Supreme Court in *McCullough* employed mandamus in a traditional manner in a situation where the

[1] Indeed even though 28 U.S.C. §1651(a) is applicable in its terms to both this Court and the Courts of Appeal, as petitioner noted in its opening brief (Br. pp. 30-31), the Supreme Court's power under this section is broader than that conferred on the inferior federal courts. See e.g., Moore's Judicial Code, p. 597 (1949).

District Judges had repudiated their jurisdiction by determining in advance that all patent cases should be referred to masters-in-chancery.

Similarly, *Ex Parte Simons*, 247 U.S. 231 (1918), is inapplicable since the district judge in that case had "repudiated" jurisdiction. No such finding is possible in the instant case where the petitioner, in making the references objected to, carefully exercised the discretion conferred upon him by Rule 53 (b). Cases such as *United States* v. *Smith*, 331 U.S. 469 (1947) relied upon by respondents (Resp. Br. pp. 5-6) likewise fail to sustain their contentions. In the *Smith* case, this Court ordered the Court of Appeals for the Third Circuit to issue a writ of mandamus directed to a district judge who had granted a new trial to a defendant under Rule 30 of The Federal Rules of Criminal Procedure, despite the fact that the time provided for by Rule 30 had expired, and despite the fact that the judgment had already been affirmed on appeal. Thus the new trial ordered by the district judge clearly constituted a usurpation of jurisdiction.

Respondents, recognizing that this Court has clearly stated that it would not allow mandamus to be used so as to subvert the Congressional policy against piecemeal review, e.g., *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1953), attempt to justify the issuance of the writ in the instant case on the ground that a review of the final judgment will not afford an adequate remedy. The fallacy of this argument, however, is easily discernable. Congress has provided the conditions under which decisions of district courts may be reviewed. 28 U.S.C. §§ 1291, 1292. By strictly circumscribing the limits of appellate review, Congress, of course, realized that in many in-

stances delays, hardship and expense would result to the litigants. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1953); *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 30 (1943). Thus any complaint which can be made as to the present system of statutory review must be remedied by an appeal to Congress, and not through the unauthorized enlargement of the availability of extraordinary writs. Furthermore, respondents' argument ignores the fact that the issuance of mandamus in the instant case has interrupted and prolonged the duration of the litigation, as do all interlocutory appeals.

Respondents similarly seek to distinguish the unmistakable pronouncements of this Court, *Parr* v. *United States*, —— U.S. ——, 76 Sup. Ct. 912 (1956); *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379 (1953); *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21 (1943), by arguing that mandamus was denied in these cases because "the party seeking the writ had a remedy on appeal from a final judgment." (Resp. Br. p. 6) However, as will be noted, the remedies available to the petitioners in those cases were no more adequate than the remedy available to the respondents in the instant case. The action complained of in the *Roche* case was an order striking a plea in abatement to a criminal indictment charging a violation of various sections of the Sherman Act. If the order were erroneous, the petitioner would be caused the expense and trouble of an unnecessary and prolonged trial. Nevertheless, this Court held that the issuance of mandamus by the Court of Appeals for the Ninth Circuit was unauthorized. In *Bankers Life & Casualty Co.*, the question before this Court was whether mandamus was an appropriate remedy to vacate a severance and transfer order entered under 28 U.S.C. § 1406(a). In holding that man-

damus would not issue, this Court cited *Gulf Research & Development Co.* v. *Leahy*, 193 F. 2d 302 (CA 3, 1951), where it was stated (pp. 304-305):

> "The mere fact that the petitioners will be put to the inconvenience and expense of what may prove to be a wholly abortive trial is an argument which might be addressed to Congress in support of legislation authorizing interlocutory appeals but does not constitute ground for invoking mandamus power."

Finally, the *Parr* case involved the question of whether an extraordinary writ would issue to review the dismissal of a criminal indictment over petitioner's objection.[2] Again this Court refused to issue an extraordinary writ even though if the order of dismissal constituted error, the trial on the new indictment would be unauthorized and would cause petitioner undue expense and hardship.

If respondents' contention that mandamus is authorized whenever appeal from a final judgment does not afford an adequate remedy is adopted, the whole system of statutory review of final orders only would be judicially abolished. Thus, mandamus could be used to review a denial of a motion to dismiss, since the order, if wrong, would create the hardship and expense of an unnecessary trial. Many other examples could be enumerated, but the decisions of this Court discussed above suffice to show that hardship and expense do not justify circumvention of Congressional policy against piecemeal appeals by the issuance of mandamus.

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[2] Petitioner was first indicted in the Corpus Christi Division of the United States District Court for the Southern District of Texas. On petitioner's motion, the case was transferred to the Laredo Division of the Southern District. The government then obtained a new indictment in the Austin Division of the Western District. Petitioner sought review of the dismissal of the first indictment granted by the court in the Corpus Christi division.

2. Aside from the question of whether the "All Writs Act" authorizes Courts of Appeal to review interlocutory orders which do not tend to frustrate eventual appellate jurisdiction, the issuance of mandamus in the instant case was erroneous. Concededly Rule 53(b) granted petitioner the power to act and to determine whether, in his considered judgment and discretion, the two related cases should be referred. And as was emphasized in petitioner's opening brief (Br. pp. 33-37), this Court has consistently held that discretionary interlocutory orders entered by a district court with power to act are not reviewable by a writ of mandamus in advance of appeal from the entry of a final order. This view finds further support in decisions of the Courts of Appeal. See *e.g., Clayton* v. *Warlick*, 232 F. 2d 699, 704, 706 (CA 4, 1956).

Respondents cite a recent and gratuitous comment of the Seventh Circuit in *Krinsley* v. *United Artists Corp.*, 235 F. 2d 253, 257 (CA 7, 1956), that references are "a practice all too common in the Northern District of Illinois." (Resp. Br. p. 7). Such reliance is wholly misplaced, since the uncontradicted facts are simply that petitioner, during the last six years (and exclusive of the referrals in the two related cases at bar) referred but nine cases to a master, four of which were hearings on limited issues (R. 12). Contrasted with the very large number of cases assigned to him (R. 11), it can only be concluded that petitioner's referrals are very much the rare exception. The possibility (even if true) that other judges may be ignoring Rule 53 (b) is insufficient to justify mandamus against petitioner who has always scrupulously complied with the rule.

Finally, respondents advance the argument that this Court should not interfere with the "Court of Appeals' exercise of its sound discretion". (Resp. Br. p. 7.) Appar-

ently, as we understand respondents' contention, it is permissible for the Court of Appeals to interfere with the exercise by petitioner of his sound discretion, but that the Court of Appeals, in so doing, is in some fashion insulated from "interference" with its "sound discretion" in substituting its discretion for that of the trial court's. As Judge Major said in dissent:

> "In my opinion, there was no abuse of discretion by respondent, but the issuance of the writ will constitute an abuse of discretion by this Court. The shoe is to be placed on the wrong foot."

Petitioner entered his order only after a careful determination that "exceptional conditions" required that a reference be made. Rule 53 (b) gave him the power to make this determination. Even assuming for the purpose of this argument that his decision was erroneous, mandamus was not an appropriate remedy to review his decision. As stated by this Court, in *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382 (1953), ". . . jurisdiction need not run the gauntlet of reversible errors."

II.

The References Were Authorized by Rule 53 (b) of the Federal Rules of Civil Procedure.

Respondents first seek to limit the reason for the referrals to "congestion" of the petitioner's trial calendar, and then rely on the *per curiam* decision of this Court in *McCullough* v. *Cosgrave*, 309 U.S. 634 (1940) to establish that "congestion" is not a proper ground for referral under Rule 53 (b). Respondents' argument is unsound both as to the basis on which the order of reference was made, as well as to the holding of the *McCullough* case.

1. As petitioner has heretofore emphasized both in his opening brief (Br. pp. 10-13), as well as in this brief

(Br. pp. 1-2), "congestion" was but one of various considerations impelling him to order the referrals, and concerning which he had fully advised the parties prior to the references. It was thus the sum of the various considerations which in petitioner's best judgment necessitated the references.

2. Moreover, respondents' interpretation of *McCullough* v. *Cosgrave*, 309 U.S. 634 (1940), appears to us to be necessarily erroneous. As petitioner pointed out in his opening brief (Br. pp. 25-26), *McCullough* condemned the "persistent disregard of the Rules of Civil Procedure" in a situation where the judges of the district court there involved had adopted a uniform practice of referring all patent cases to masters-in-chancery. *McCullough* thus struck at a practice which amounted to the abdication of judicial discretion. Such is not the case at bar as is amply demonstrated by only nine referrals by petitioner over six years. Respondents seek to find a "persistent disregard" by petitioner of Rule 53 (b) because he simultaneously referred the two related cases here involved to a master-in-chancery (Resp. Br. p. 10). This action can hardly be characterized as a "persistent disregard" of Rule 53 (b). Respondents' argument is frivolous.

Nor are respondents on sound ground in claiming that "congestion" alone may not on occasion be a proper ground for a referral, for respondents leave completely unanswered the fact that *Los Angeles Brush Mfg. Corp.* v. *James*, 272 U.S. 701 (1927), of necessity must stand for the proposition that a congested docket was sufficient to sustain a reference under Equity Rule 59, the predecessor of Rule 53 (b). In light of this fact, *McCullough* v. *Cosgrave*, 309 U.S. 634 (1940), a *per curiam* opinion relying solely upon *Los Angeles Brush Mfg. Corp.* v. *James*, can-

not be construed, as urged by respondents, to hold that congestion of a court calendar is never an adequate ground for a referral. Indeed, such a holding would have necessitated a reversal of the *Los Angeles Brush Mfg. Corp.* case, rather than reliance upon it.

Other authorities similarly hold that congestion may justify a reference. Petitioner has presented a number of cases in support of this contention (Br. pp. 21-23). To this list may be added *Skinner* v. *Aluminum Co. of America*, 95 F. Supp. 183, 184 (W.D. Pa. 1951); *Apex Electrical Mfg. Co.* v. *Sears, Roebuck & Co.*, 15 Fed. Rules Serv. 53 b. 12, Case No. 3, pp. 885-886 (N.D. Ohio 1951). ("In these exceptional circumstances, it is my considered judgment that one piece of private litigation ought not to be allowed to tie up, for several weeks and perhaps two or three months, the complete and exclusive time and attention of one of the judges of this court.")

Respondents argue that petitioner should have resorted to "procedural" devices to "ascertain the true nature of these cases". (Resp. Br. p. 12). The docket entries, including the large number of contested motions, court rulings, and related matters (R. 29-57; 222-240), most assuredly gave petitioner an intimate knowledge of the "true nature" of the cases without resort to other unnamed "procedural devices", and similarly obviated the need for pretrial conferences.

Respondents did move for summary judgment, which motions were denied. Respondents' statement that "although requested to do so", petitioner did not in his order denying the motions "specify the facts that appear without substantial controversy" is inaccurate and misleading in its implications. (Resp. Br. p. 12). In petitioner's opinion denying the motions for summary judgment (reported

in 20 Fed. Rules Serv. 56 d. 2, Case No. 1, p. 817), petitioner explicitly stated the reasons why the movants were not entitled to a specification of facts.

The arguments of respondents on the complexity of the two related cases which were referred are adequately met in petitioner's opening brief (Br. pp. 5-10), and need not be repeated here. It is sufficient to say that respondents, who characterized the cases at bar as "fantastically complicated" in argument before the petitioner in the trial court, now find the cases somehow transformed into ones of "not unusual complexity". (Resp. Br. p. 12)

The majority of the Court of Appeals thought *McCullough v. Cosgrave*, 309 U.S. 634 (1940), decisive of the referrals challenged by the mandamus petitions. 226 F. 2d 703, 707-709, 712-713.[3] For the reasons set forth in our opening brief (Br. pp. 25-26), and in this reply (Br. pp. 11-12), we respectfully suggest that the majority of the court below misconstrued and misapplied *McCullough*. This wholly misplaced reliance on *McCullough* thus reduces the cases at bar to a situation in which petitioner, after an individual appraisal and balancing of all of the factors surrounding the necessity and propriety of a reference, made his determination in the exercise of the discretionary power conferred upon him by Rule 53 (b) that the two related cases should be referred.

Rule 53 (b), authorizing reference to masters, was surely adopted to permit busy courts, under exceptional conditions, to have the aid of Masters to get their work

[3] Respondents apparently now concede that probably this Court entertained the writ in **McCullough** by reason of the "persistent disregard" by the judges of the district court there involved (Resp. Br. p. 10). Respondents, however, still place major reliance on **McCullough**, asserting that the reason for entertaining the writ was not the ground relied upon by this Court for its issuance.

done. If Masters are to be in effect abolished, it should be done by a formal change in the rule, not by the emasculation of the present rule, which obviously authorizes refences within limits. We respectfully ask this Court to reverse the orders of the Court of Appeals, and to give an authoritative interpretation of Rule 53 (b) for the guidance of the lower courts—a practical construction broad enough to give the trial courts reasonable assistance in getting their work done.

CONCLUSION.

For these reasons, petitioner respectfully submits that the judgments of the Court of Appeals be reversed, and the cases remanded to that court with instructions to dismiss the petitions for mandamus.

Respectfully submitted,

THE HONORABLE WALTER J. LA BUY,
United States District Judge,
Petitioner,

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